MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Bradley Scott Anthony Bornmann,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff

February 26, 2021

Court of Appeals Case No. 20A-CR-1288

Appeal from the Shelby Superior Court

The Honorable David N. Riggins, Judge

Trial Court Cause No. 73D02-1910-CM-986

Crone, Judge.

Case Summary

[1] Bradley Scott Anthony Bornmann pled guilty by plea agreement to class A misdemeanor operating a vehicle while intoxicated (OWI) in a manner that endangers a person and admitted to being a habitual vehicular substance offender (HVSO). The plea agreement capped his sentence at six years and provided that his driver's license would be suspended for 365 days. The plea agreement also included a waiver of Bornmann's right to appeal his sentence. The trial court sentenced Bornmann to an aggregate six-year term and suspended his driver's license for a mandatory two years plus four additional years. Bornmann now appeals his sentence. Finding that he waived his right to Appellate Rule 7(B) review of his six-year sentence, we affirm it. Finding that the trial court improperly suspended his driver's license for a duration that exceeds the duration specified in the plea agreement, we remand for correction of the court-ordered portion of his license suspension. Also on remand, we instruct the court to correct a clerical error in the abstract of judgment.

Facts and Procedural History

[2] Around 6:15 p.m. on October 4, 2019, Indianapolis Metropolitan Police Department Detective Frank Miller was driving his police vehicle eastbound on Interstate 74. As he exited at London Road in Shelby County, he observed a black SUV that swerved off the right side of the exit ramp and into the grass, overcorrected, and swerved over to the left side of the ramp, nearly into the grass. The SUV then turned southbound onto London Road and crossed into the northbound lane of traffic before swerving back into its lane. The SUV ran

off the roadway as it turned east onto Frontage Road. Detective Miller activated his lights and followed the SUV, which swerved off the roadway two more times before stopping. When the detective approached and spoke to the driver, Bornmann, he noticed that Bornmann smelled like an alcoholic beverage and had glassy, bloodshot eyes. Bornmann fumbled through his wallet for his license and almost dropped it.

[3] Detective Miller called the local sheriff's office, and Deputy Ian Michael arrived shortly thereafter. Bornmann told the deputy that he had been drinking at a bar in Indianapolis after work and probably was legally drunk. Deputy Michael noticed that Bornmann had slurred speech and watery eyes, smelled like an alcoholic beverage, and was swaying and struggling to stand still. After Bornmann failed three field sobriety tests, Deputy Michael read him the implied consent card. Bornmann refused the chemical breath test. When the deputy contacted dispatch to run Bornmann's license, he discovered that Bornmann had an outstanding arrest warrant from 2010. Another deputy placed Bornmann in a patrol vehicle while Deputy Michael conducted an inventory search of the SUV for towing. In the center console, Deputy Michael discovered a one-hitter pipe with burnt residue and plant material later determined to be marijuana. Bornmann admitted that the pipe belonged to him and that he had smoked marijuana through the pipe about three hours earlier. The deputies obtained a warrant and transported Bornmann to a nearby hospital for a blood draw. During the drive, Bornmann became irate and

threatened to kick Deputy Michael. The blood test results established that Bornmann had a .299 blood alcohol level.

[4] The State charged Bornmann with class A misdemeanor OWI with endangerment, class B misdemeanor possession of marijuana, class C misdemeanor possession of paraphernalia, class A misdemeanor OWI per se (at least .15 grams of alcohol per 210 liters of breath or 100 milliliters of blood), and a HVSO enhancement based on his having had at least three prior OWI convictions. Bornmann entered into a plea agreement pursuant to which he pled guilty to class A misdemeanor OWI with endangerment and admitted to the HVSO count. In exchange, the remaining counts were dismissed and his sentence was capped at six years. The plea agreement stated that Bornmann's driver's license would be suspended for 365 days. It also stated, "If you are pleading guilty to a driving offense … such offense will be reported to the bureau of motor vehicles and your license may be suspended." Appellant's App. Vol. 2 at 59. The agreement included the following relevant waiver provisions:

> The defendant waives any right to appellate review of his/her sentence, and waives participation in any Community Transitioning Program.
>
> ….
>
> 14. The defendant hereby waives the right to appeal any sentence imposed by the Court, under any standard of review, including but not limited to, an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule

> 7(B), so long as the Court sentences the defendant within the terms of the plea agreement.

Id. at 58-59.

[5] The trial court conducted a guilty plea hearing, established a factual basis, accepted the plea agreement, and entered judgment of conviction against Bornmann on the OWI with endangerment count and the HVSO finding. Appealed Order at 1. At the close of the guilty plea hearing, the court clarified with the defense that the 365-day license suspension provision pertained to the OWI offense and that it was in addition to the administrative suspension to be imposed by the Bureau of Motor Vehicles (BMV). Guilty Plea Tr. Vol. 2 at 12. The trial court conducted a sentencing hearing and imposed a term of 365 days for Bornmann's class A misdemeanor, plus five years for his HVSO enhancement, with three years executed and two years on home detention, all to run consecutive to his sentence in another cause. The trial court included in the sentence a four-year driver's license suspension, in addition to the mandatory administrative license suspension imposed by the BMV. Bornmann now appeals his sentence. Additional facts will be provided as necessary.

Discussion and Decision

Section 1 –Bornmann's claim that his HVSO enhancement was dismissed is meritless.

[6] As a preliminary matter, we address Bornmann's claim that his HVSO finding was dismissed. As support, he points us to the abstract of judgment, which lists

it as such. However, the judgment of conviction specifically includes the enhancement for the HVSO finding, and the plea agreement and transcripts of the guilty plea and sentencing hearings reflect Bornmann's admission to his status as a HVSO. The abstract of judgment is not the same as the judgment of conviction, and as between the judgment of conviction and the abstract of judgment, the judgment of conviction controls. *Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004). Thus, the clerical error in the abstract of judgment is not controlling, and Bornmann's argument is meritless. Nevertheless, we remand to correct the abstract of judgment to bring it into conformity with the judgment of conviction.

Section 2 – The trial court erred in suspending Bornmann's driver's license for a duration that exceeds the terms of the plea agreement.

[7] Bornmann asserts that the trial court violated the terms of his plea agreement by "imposing a four-year [driver's license] suspension as part of [his] sentence." Reply Br. at 4. He raises this claim for the first time in his reply brief. Ordinarily, arguments raised for the first time in a reply brief are waived. *Jones v. State*, 22 N.E.3d 877, 881 n.4 (Ind. Ct. App. 2014). Here, a facial discrepancy exists between the judgment of conviction and the plea agreement concerning the duration of Bornmann's license suspension. Thus, even though Bornmann should have raised this claim in his primary brief, thereby affording the State an opportunity to respond to it, we choose to address it on the merits.

[8] Bornmann's claim concerns the trial court's handling of his plea agreement. Plea agreements between the defendant and the State are contractual in nature. *Rodriguez v. State*, 129 N.E.3d 789, 794 (Ind. 2019). "If the court accepts a plea agreement, it shall be bound by its terms." Ind. Code § 35-35-3-3(e). A sentencing provision is a significant component of a plea agreement, but severing a sentence provision does not necessarily do violence to the agreement as a whole. *Lee v. State*, 816 N.E.2d 35, 39 (Ind. 2004).

[9] Bornmann does not ask that we discard the entire plea agreement but rather limits his challenge to his sentence. He first maintains that his license suspension exceeds the terms of the plea agreement and must be reduced accordingly. He asks that we reduce the duration of his license suspension pursuant to the "so long as" language included in the waiver provision of his plea agreement. *See* Appellant's App. Vol. 2 at 59 (stating that defendant waives right to appeal his sentence "*so long as* the Court sentences the defendant within the terms of the plea agreement.") (emphasis added).

[10] To provide context to Bornmann's license suspension claim, we start with the generally understood notion that operating a vehicle on Indiana roadways is considered a privilege. Ind. Code Ch. 9-30-6. "A person who operates a vehicle impliedly consents to submit to the chemical test provisions of [Chapter 6] as a condition of operating a vehicle in Indiana." Ind. Code § 9-30-6-1. To comply with the implied consent provisions, the "person must submit to each chemical test offered by a law enforcement officer" when indicia of the driver's intoxication are present. Ind. Code § 9-30-6-2(d). In the case of a breath test

refusal (BTR), "the [BMV] *shall* suspend the driving privileges of the person … if the person has at least one (1) previous conviction for operating while intoxicated, [for] two (2) years[.]" Ind. Code § 9-30-6-9(b)(1)(B) (emphasis added).

[11] Here, Bornmann does not dispute that he refused to submit to a chemical breath test at the scene. Nor does he dispute his prior OWI convictions, as evidenced in his admission to being a HVSO, a status which requires a showing of three predicate OWI offenses.[1] Rather, he claims that because the plea agreement specifies that his license will be suspended for 365 days, "[t]he trial court erred in imposing a four-year license suspension as part of [his] sentence." Reply Br. at 4. The appealed order specifies with respect to license suspension: "Defendant's operator's license is suspended for BTR followed by a 4[-]year license suspension; ordered served consecutively." Appealed Order at 3. Indiana Code Section 9-30-6-9(b)(2)(B) requires the BMV to suspend Bornmann's license for two years under the current facts, and the trial court's imposition of any additional suspension does not (and cannot) affect the mandatory two-year administrative suspension by the BMV. The plea agreement accounted for this. *See* Appellant's App. Vol. 2 at 59 (stating, "If you are pleading guilty to a driving offense … such offense will be reported to the BMV and your license may be suspended."). Moreover, at the end of Bornmann's guilty plea hearing, the trial court sought and gained clarification

[1] The record indicates that Bornmann has six previous OWI convictions.

that the one-year (365-day) suspension listed on page one of the plea agreement was for the current OWI offense itself and was over and above any administrative suspension imposed by the BMV. Guilty Plea Tr. Vol. 2 at 12.

[12] In short, it is clear, both from the record and from Bornmann's reply brief, that his argument pertains only to the four-year portion of the suspension that the trial court imposed, irrespective of the BMV's automatic suspension for the BTR. Regardless, the trial court could control only the portion of Bornmann's license suspension not otherwise required under the statute. Because the court-ordered portion of Bornmann's license suspension exceeds by three years the suspension listed in the plea agreement, we remand with instructions to correct the duration of his license suspension to reflect the terms of the plea agreement.

Section 3 – Bornmann has waived review of his Appellate Rule 7(B) challenge.

[13] Bornmann also asks that we reduce his sentence pursuant to Indiana Appellate Rule 7(B), which states that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [this] Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Bornmann's plea agreement includes a six-year sentence cap and two waiver provisions, both of which state that the defendant waives the right to appellate review of his sentence. Appellant's App. Vol. 2 at 58-59. Paragraph 14 specifies that the defendant's waiver of the right to appeal his sentence includes review under "an abuse of discretion standard and the appropriateness of the sentence under Indiana Appellate Rule 7(B), so long as

the Court sentences the defendant within the terms of the plea agreement." *Id*. at 59.

[14] As with his license suspension claim, Bornmann predicates his request for Appellate Rule 7(B) review on the "so long as" language, claiming that the court's failure to abide by the plea agreement's limit on license suspension nullified the entire waiver provision. Thus, he maintains that we must now conduct a Rule 7(B) review of his sentence even though his sentence comports with the six-year sentence cap specified in the plea agreement. We disagree, concluding that under the current circumstances, we may remand with an order to correct the portion of the plea agreement that runs afoul of the "so long as" language without eviscerating the remaining portions of the plea agreement. *See Lee*, 816 N.E.2d at 40.

[15] Bornmann submits that even if the written waiver is valid, he is entitled to Appellate Rule 7(B) review because of certain statements made by the trial court during sentencing. A defendant may knowingly waive the right to appellate review of his sentence as part of a written plea agreement. *Creech v. State*, 887 N.E.2d 73, 76 (Ind. 2008). This is true even where, as here, the trial court makes confusing remarks during sentencing concerning the right to appeal. *Id*.; *see also Starcher v. State*, 66 N.E.3d 621, 623 (Ind. Ct. App. 2016) (upholding waiver where plain terms of plea agreement demonstrated defendant's knowing and voluntary waiver of right to appeal sentence and confusing statement that he could appeal his sentence was made only after he had "received the benefit of his plea agreement."), *trans. denied* (2017). During

Bornmann's guilty plea hearing, the trial court ensured that Bornmann understood that, per the plea agreement, he was waiving his right to appeal his sentence. The court's general statement at the end of sentencing that Bornmann could appeal and have counsel appointed came after Bornmann had received the benefit of his plea agreement and does not eviscerate the waiver provision.

[16] Bornmann also claims that he is entitled to Appellate Rule 7(B) review because he was sentenced to six years for a class A misdemeanor. This claim is predicated on his meritless argument that his HVSO enhancement was dismissed. As previously discussed, Bornmann's HVSO enhancement was not dismissed. His six-year aggregate term, comprising one year for his class A misdemeanor conviction plus five years for the HVSO enhancement finding, falls within the plea agreement's six-year sentence cap.[2] License suspension notwithstanding, the trial court *did* sentence Bornmann "within the terms of the plea agreement." As such, the waiver provision is valid, Bornmann is not entitled to Appellate Rule 7(B) review, and his six-year sentence is affirmed. Notwithstanding, we remand for correction of the license suspension portion of Bornmann's sentence and for correction of the clerical error in the abstract of judgment.

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[2] Bornmann's sentence also falls within the statutory ranges for the offenses. *See* Ind. Code § 35-50-3-2 (for a class A misdemeanor, defendant may be sentenced to a term of not more than one year); *see also* Ind. Code § 9-30-15.5-2(d) (HVSO finding carries range of an additional one to eight years).

[17] Affirmed and remanded.

Najam, J., and Riley, J., concur.